84-1369

No. ———

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MANHATTAN COFFEE COMPANY,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 688,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

IRA MICHAEL SHEPARD *
PAUL MONROE HEYLMAN
NANCY LEE MORAN
SCHMELTZER, APTAKER & SHEPPARD, P.C.
Suite 500
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-1000
Counsel for Petitioner Manhattan Coffee Company

* Counsel of Record

February 28, 1985

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QUESTIONS PRESENTED

1. Whether the decision of the United States Court of Appeals for the Eighth Circuit below, which affirmed enforcement of a labor arbitrator's award holding that the award "drew its essence" from the applicable collective bargaining agreement, conflicts with the precedent of this Court to the grave detriment of the integrity of the arbitral process where the arbitrator found that petitioner's actions were taken in good faith and "uncontrovertedly based on sound business considerations" and then unilaterally, without argument, evidence or testimony, amended the collective bargaining agreement and excised the "sound business considerations" proviso to the subcontracting clause holding that the proviso is inapplicable to the workers covered by the collective bargaining agreement.

2. Whether this Court's principles governing judicial review of labor arbitrators' awards set forth 25 years ago in the *Steelworkers Trilogy* and, specifically, in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), are vague enough to enable reviewing courts to escape their mandated responsibility of ensuring that labor arbitrators' awards are faithful to the underlying labor agreement, and should be clarified to provide guidance to reviewing courts in order to avoid enforcement of labor arbitration awards based on an arbitrator's unilateral amendment or excision of a term of the underlying collective bargaining agreement as in the present case.

PARTIES BELOW

Parties to this case in the court below are those listed in the caption of this petition. The union herein is the bargaining representative of the hourly employees of petitioner at petitioner's St. Louis operations in two separate collective bargaining units. The union is a party to this case as representative of grievant Ms. Schwenck, a member of the office and clerical bargaining unit.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Manhattan Coffee Company respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding.

OPINIONS BELOW

The opinion of the court of appeals, with dissent of Judge McMillian, affirming the district court order and opinion, reported at 743 F.2d 621 (8th Cir. 1984), and the order of the court of appeals denying, by five-to-four vote, petitioner's petition for rehearing *en banc*, not reported, are set out at Appendices A and B, respectively. The opinion and order of the district court, reported at 571 F. Supp. 347 (E.D. Mo. 1983), are set out at Appendices C and D, respectively.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1984. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by five-to-four vote by order entered on October 31, 1984. On January 24, 1985, by order of this Court, petitioner's time in which to file a petition for writ of certiorari was extended from January 29, 1985 to and including February 28, 1985, and this petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), provides in pertinent part:

> (1) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 10 of the United States Arbitration Act, 9 U.S.C. § 10 provides in pertinent part:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> • • • •
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d), provides in pertinent part:

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, . . .

STATEMENT OF THE CASE

A. Introduction.

This case was initiated pursuant to a complaint filed by Manhattan Coffee Company (herein "company" or "Manhattan") under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and the United States Arbitration Act, 9 U.S.C. §§ 9, 10, 11, seeking to vacate an arbitrator's award. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 688 (herein "union"), the union representing the company's office and clerical workers and another unit of warehouse and equipment repair workers, filed a counterclaim to enforce the award. The district court, following cross-motions for summary judgment, entered an order enforcing the arbitrator's award. The company filed a notice of appeal to the United States Court of Appeals for the Eighth Circuit seeking reversal of the district court's decision for the reason that the arbitrator exceeded his authority by excising the "sound business considerations" proviso of the subcontracting clause in the

parties' contract. The union cross-appealed from the district court's refusal to grant attorneys' fees to the prevailing party. A three-judge panel of the Eighth Circuit affirmed the district court's decision, with Judge McMillian filing a dissent in which he would have vacated the underlying labor arbitrator's award for the reasons argued by petitioner. The company filed a petition for rehearing *en banc* which was denied by five judges; four of the judges would have granted the petition.

B. Findings of Fact by the Panel of the Eighth Circuit.

The undisputed facts as found by the panel of the Eighth Circuit are as follows:

> The Manhattan Coffee Company (the company) and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 688 (the union), are parties to a collective bargaining contract covering the company's office and clerical workers for the period July 1, 1982 through June 30, 1985. A separate but similar contract covers the company's warehouse and service maintenance workers. The main bone of contention now is Article 28 of the grievant's contract, entitled 'Subcontracting':
>
> > The Employer agrees that no function or service presently performed, or hereafter assigned, to the bargaining unit shall be subcontracted, leased, assigned or conveyed in whole or in part to any other person or organization, if any member of the bargaining unit is, at the time of such action, on layoff due to lack of work. The Employer agrees that the layoff proviso shall not be applicable until July 1, 1983.
> >
> > *The above language shall not be construed or interpreted to prohibit the Employer from* adding or *discontinuing* manufacture, packaging, or processing of a product or *performance of a*

service based on sound business considerations. [Emphasis added.]

[*See* Appendix E.]

Before July 1, 1983, the payroll and accounts payable functions were performed by the office and clerical unit of the company. On July 26, 1982, an employee, Patricia A. Schwenck, covered by the collective bargaining agreement, initiated a grievance while she was on layoff which alleged a contract violation by transfer of her work out of the bargaining unit to the production facility of the parent corporation in Oklahoma City.

The grievance was denied on July 27, 1982. There was a dispute as to whether the employee thereafter timely pursued proper procedures to appeal the denial. The matter went to arbitration before an impartial arbitrator, Richard L. Ross, who conducted a hearing and, on January 14, 1983, issued his opinion and award sustaining the grievance both as to arbitrability and on the merits. The arbitrator ordered the company to cease transferring the office bargaining unit work to the Oklahoma City plant and awarded grievant back pay from the date she filed the grievance.

The arbitrator specifically found that the company's decision to transfer the payroll and accounts payable work was taken in good faith and was based on sound business considerations. [Emphasis added.] The company was suffering because of severe economic problems and decided to cease the production of coffee in St. Louis. Sales volume had decreased by 65 percent even though the number of employees remained the same. The company and the union agreed that Manhattan would continue in St. Louis as a distribution warehouse, a service department, and an office, with a substantial reduction in personnel. The plan was implemented on June 30, 1983. With respect to the office, in issue here, the staff was reduced from ten to five. Four St. Louis employees were given severance pay and were terminated. Grievant

was placed on layoff at her election because, with her seniority, she expected to be the first recalled if needed.

Manhattan Coffee Co. v. International Brotherhood of Teamsters, Local 688, 743 F.2d 621, 622-623 (8th Cir. 1984).

C. Decisions of the Arbitrator, the District Court and the Court of Appeals.

The arbitrator held that the transfer of work was a violation of the parties' collective bargaining agreement. He ruled that although the company's actions were within the ambit of the "sound business considerations" exception to the subcontracting provision, that provision did not apply to the work of the office and clerical unit. No argument was made nor evidence submitted or testimony taken as to the inapplicability of the "sound business considerations" proviso to the office collective bargaining agreement. Rather, all parties at the hearing assumed its applicability to the only workers covered by the contract.

The district court upheld the arbitrator's decision, finding the decision to be based on 1) the ambiguity of the language of the "sound business considerations" proviso which was "subject to conflicting, reasonable interpretations when applied to the office bargaining unit" and 2) the parties' bargaining history. *Manhattan Coffee Co. v. International Brotherhood of Teamsters, Local No. 688*, 571 F. Supp. 347, 351 (E.D. Mo. 1983).

The Eighth Circuit Court of Appeals panel rejected the district court's finding that the arbitrator's award was based on bargaining and negotiating history, there being no record evidence to that effect. However, despite finding that the contract on its face appeared to apply only to office and clerical workers, the majority of the panel upheld the lower court's decision to enforce the award, finding that the award was based on a narrow but not impermissible reading of ambiguous contract language. They so found even though such a "reading" made the

contract provision inapplicable to the parties covered by the contract. The third member of the panel, dissenting, found that 1) the language was both unambiguous and, by the terms of the contract, solely applicable to the office unit work; 2) the arbitrator in effect amended the parties' contract; and, thus, 3) the arbitrator's decision could not be said to draw its essence from the collective bargaining agreement.

Petitioner then filed a petition for rehearing *en banc*. That petition was denied; however, four of the judges would have granted the petition.

REASONS FOR GRANTING THE WRIT

I. The Decision of the United States Court of Appeals for the Eighth Circuit Conflicts with the Precedent of This Court and Raises Questions Affecting the Integrity of the Arbitral Process by Affirming the Authority of an Arbitrator to Unilaterally Amend and Excise a Specific Term of a Collective Bargaining Agreement Where No Argument Was Made nor Evidence Presented to Support the Excision.

As this Court dictated 25 years ago in handing down the *Steelworkers Trilogy*, the role of the federal courts in reviewing a labor arbitrator's award is very narrow. This Court has declared that a court is not to redetermine the merits of the award, but to determine whether the award "draws its essence from the collective bargaining agreement." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). An arbitrator's award is unenforceable where it deviates from the plain meaning of the contract and is unsupported by the contract or prior practices, *Detroit Coil Co. v. International Association of Machinists & Aerospace Workers, Lodge No. 82*, 594 F.2d 575, 579 (6th Cir.), *cert. denied*, 444 U.S. 840 (1979), or where the arbitrator undertakes in effect to amend the contract, to substitute his discretion for that of the parties, or to dispense

his own brand of industrial justice. *Enterprise Wheel*, 363 U.S. at 597; *Timken Co. v. Local Union No. 1123, United Steelworkers of America*, 482 F.2d 1012 (6th Cir. 1973). It is well settled that, while an arbitrator may construe ambiguous contract language, the arbitrator lacks authority to disregard or modify plain or unambiguous contract provisions. *See, e.g., International Brotherhood of Firemen & Oilers, Local No. 935-B v. The Nestle Company, Inc.*, 630 F.2d 474 (6th Cir. 1980); *Sears, Roebuck & Co. v. Teamsters Local Union No. 243*, 683 F.2d 154 (6th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983).

Mindful of this limited scope of review afforded labor arbitration decisions, but also of the principle set down by this Court that such decisions must draw their essence from the collective bargaining agreement, *Enterprise Wheel*, 363 U.S. at 597, petitioner requests that the decision of the Court of Appeals herein affirming enforcement of the arbitrator's award in the present case be reversed. That decision incorrectly affirms the authority of the arbitrator to amend the parties' collective bargaining agreement by excising a contract provision, namely a "sound business considerations" proviso to the agreement's subcontracting clause. Even the majority decision of the Eighth Circuit reversed the district court's finding that the arbitrator's award is based on record evidence. The arbitration award in question is incredible. Instead of drawing from the essence of the contract, the arbitrator erased any connection with the essence of the contract by, first, finding that the employer's actions in subcontracting work were taken in good faith and uncontrovertedly for sound business considerations and, second, holding that the "sound business considerations" proviso, which is part of the contract, does not apply to the workers covered by the contract. Such a decision is strained in any event, because the language he excised is contained in the contract. Moreover, the decision also is

impossible in this case where neither the company nor the union contested the proviso's applicability to the facts or its propriety in the contract, and, as the circuit court held, there is no record evidence of any kind upon which to base this award.

At issue in the present case is the extent of the arbitrator's authority with respect to altering the terms of the collective bargaining agreement under which he must make his decision. This Court set forth the scope of court review of an arbitrator's decision in *Enterprise Wheel*. There, this Court noted that the arbitrator "does not sit to dispense his own brand of industrial justice." *Id.* at 597. While the arbitrator may look for guidance from many sources, "his award is legitimate only so long as it draws its essence from the collective bargaining agreement." *Id.*

The arbitrator herein ruled that the provision in question has no application in the office collective bargaining agreement. Under his decision, the provision no longer exists in the contract. He did not find the provision applicable generally but inapplicable to the facts before him, nor did he find a failure to prove "sound business considerations." Rather, he found the provision inapplicable to office and clerical workers, the only workers covered by the contract. He modified the plain language of the contract by unilaterally obliterating it from the contract —based neither on record evidence nor even a union argument. The issue before him was whether there were sound business considerations justifying the subcontracting in question. He found affirmatively on that issue and then removed the provision from the contract. Such an award cannot "draw its essence" from the contract when it erases one of the contract terms.

Unlike the arbitration awards affirmed in previous Eighth Circuit decisions, the arbitrator here did not rely on 1) a construction of a common collective bargaining

agreement provision, *Lackawanna Leather Co. v. United Food & Commercial Workers*, 706 F.2d 228, 231 (8th Cir. 1983) (*en banc*); or 2) an understanding based on that of " 'an ordinary reader' of the English language," *United Food & Commercial Workers, Local 222 v. Iowa Beef Processors, Inc.*, 683 F.2d 283, 285 (8th Cir.), *cert. denied*, 459 U.S. 1088 (1982), in rendering his decision. Rather, the arbitrator herein ignored the common ordinary meaning of the contract term before him. *Webster's Third New International Dictionary* (unabridged 1971) defines "service" as the performance of work commanded or paid for. Under this commonly accepted definition of service, the term unambiguously covers office and clerical work. As the dissenting member of the Eighth Circuit panel herein stated, the contract at issue covers only the office and clerical unit and in that context must apply to the work by the office unit at issue here. *Manhattan Coffee*, 743 F.2d at 625 (McMillian, J., dissenting). Even the two-member majority of the panel conceded that the contract appeared on its face to apply only to the office and clerical employees, 743 F.2d at 623, although it refused to consider any impact that might have on whether there was a rational basis for the arbitrator's award. Indeed, the cover page and recognitional article both, unambiguously, indicate that the agreement applies only to the office and clerical workers. *See* Appendix E.

To permit an arbitrator to rewrite the parties' collective bargaining agreement by allowing him to choose to apply some but not other contract provisions as applicable to the parties to the agreement, as does the decision of the Eighth Circuit herein, threatens the entire arbitral process. To allow the arbitrator to amend the parties' agreement in this fashion not only flies in the face of this Court's precedent in *Enterprise Wheel*, but also produces results which are contrary to the basic concept of American labor relations law, namely, that the parties to a collective bargaining agreement are not compelled to ad-

here to a contract to which they have not agreed. *See* National Labor Relations Act § 8(d), 29 U.S.C. § 158(d). The decision of the Eighth Circuit in the present case introduces a level of uncertainty concerning the parties' rights to write their own agreements that could disrupt the collective bargaining process.

II. The Supreme Court's Principles Governing Judicial Review of Arbitration Awards Set Forth 25 Years Ago in the *Steelworkers Trilogy* and, Specifically, in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), Are Vague Enough to Enable Reviewing Courts to Escape Their Mandated Responsibility of Ensuring That Labor Arbitrators' Awards Are Faithful to the Underlying Labor Agreement and Should Be Clarified to Provide Guidance to the Reviewing Courts in Order to Avoid Enforcement of Awards Based on an Arbitrator's Amendment or Excision of a Term of the Underlying Collective Bargaining Agreement as in the Present Case.

In 1960, this Court set forth the principles governing arbitration in a labor relations setting that have since become known as the *Steelworkers Trilogy*. *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). In those cases, this Court affirmed the preference of national labor policy for arbitration to resolve disputes between labor and management in a collective bargaining setting. Pursuant to the policy of preference for arbitration, this Court limited the scope of judicial action in a labor dispute covered by an arbitration agreement and declared that a determination on the merits of a dispute between parties to a collective bargaining agreement providing for arbitration was for the arbitrator, not the courts, to decide. Such a "plenary review by a court of the merits would

make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final." *Enterprise Wheel*, 363 U.S. at 599. However, this Court did not suggest that judicial review was to be a meaningless exercise. This Court mandated that federal courts defer to the decisions of arbitrators only when those decisions drew their essence from the underlying collective bargaining agreement:

> An arbitrator is confined to interpretation and application of the collective bargaining agreement: he does not sit to dispense his own brand of industrial justice . . . . He may, of course, look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to his obligations, courts have no choice but to refuse enforcement of the award.

363 U.S. at 597. These standards, however, are in themselves ambiguous—leaving open the question as to whether the reviewing court may look beyond the arbitrator's words to determine whether his award is faithful to the agreement. *See* Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, 34 U. Chi. L. Rev. 545, 550 (1967).

The Second Circuit, considering the ambiguity in the standards of *Enterprise Wheel*, held that a court's review in an action to enforce or vacate an award involving the validity of the award should go beyond the rhetoric of the arbitrator's award to consider the fidelity of the award to the agreement. *Torrington Co. v. Metal Products Workers Local 1645*, 362 F.2d 677 (2d Cir. 1966). Relying on the admonitions of *Enterprise Wheel*, the Second Circuit held that the arbitrator's authority is subject to review, and the arbitrator's decision that he has authority should not be accepted by the reviewing court where the court can clearly perceive that his authority stems from sources outside the contract. 362

F.2d at 680. On this basis, the court overturned an arbitrator's award based on alleged past practice where the evidence clearly showed a revocation of that practice and negotiation of a new contract which did not incorporate the former practice. *Id.* The Sixth Circuit has also adopted an approach parallel to the Second Circuit. *International Brotherhood of Firemen & Oilers, Local No. 935-B v. The Nestle Company, Inc.*, 630 F.2d 474 (6th Cir. 1980).

The Eighth Circuit has not adopted the rationale of the Second Circuit or Sixth Circuit and has displayed an uncertainty as to the appropriate limits of their review as in the present case. The affirmance of the arbitration award herein came in a two-to-one decision which included a strongly worded dissent. Upon petitioner's application for rehearing *en banc*, the full Circuit denied petitioner's application in a five-to-four decision.

In the present case, the court's reluctance to look beyond the rhetoric of the arbitrator's award to determine the extent of the award's substantive faithfulness to the parties' agreement, and the court's uncertainty as to the legitimate extent of its review, have led to the anomalous result of imposing on the parties a collective bargaining agreement, different from the one they agreed on, namely a new agreement unilaterally amended by the arbitrator. Even though the panel majority conceded that the contract at issue appeared on its face to apply only to the office and clerical unit, in its reluctance to deal with the award's substantive infidelity to the underlying contract, it rejected that argument in favor of declaring that the arbitration ruling was "narrow" but not impermissible. We submit that this conclusion is error under the *Steelworkers Trilogy* precedent of this Court. We submit a different result would have occurred in both the Second and Sixth Circuits. *See, e.g., Torrington Co. v. Metal Products Workers Local 1645*, 362 F.2d 677 (2d Cir.

1966); *International Brotherhood of Firemen & Oilers v. The Nestle Company, Inc.*, 630 F.2d 474 (6th Cir. 1980).

Twenty-five years have passed since this Court considered the policy and judicial context of labor arbitration in the *Steelworkers Trilogy*. The present case presents a vehicle by which this Court can provide clarification of those principles set forth in the *Steelworkers Trilogy* and, specifically, *Enterprise Wheel*, in order to provide guidance to all federal courts and consistency between the circuits. Such guidance would enable the courts to ensure the substantive, not merely rhetorical, fidelity of such awards to the parties' collective bargaining agreements while maintaining the limited review of arbitration awards envisioned by this Court.

The risk of too much intervention by the courts in the merits of an award would be minimal if this Court provided guidance for appropriate exercise of judicial responsibility circumscribed by specific limitations. Professor Meltzer, in his article, *supra*, suggests that limitations modeled on the limitations on judicial review of master's findings in the federal courts could be adapted for judicial review of arbitration awards. Thus, the findings of the arbitrator would be respected unless they were manifestly erroneous and the award would be enforced unless it clearly lacked a rational basis in the agreement read in the light of the common law of the plant. *Meltzer, supra*, at 555. Professor Meltzer suggests several values to be achieved by this limited judicial responsibility, including heightened arbitrator sensitivity to the admonition of *Enterprise Wheel* regarding the source of the arbitrator's authority, increased willingness of employers to agree to arbitration clauses without demands for exclusions, and clearer, better reasoned opinions of arbitrators. *Id.* at 554.

The conviction on which Professor Meltzer bases his recommendations, and on which petitioner urges this

Court's review in the present case, is that arbitration, like other systems of adjudication, should not be able to invoke judicial power while denying judicial responsibility. We are mindful that enforcement of the national labor policy favoring arbitration demands that *de novo* judicial review be assiduously guarded against. Direction from this Court is needed as this issue has not been addressed in 25 years and the power of labor arbitrators to exercise authority without the accountability required of the federal judiciary or federal administrative agencies is in the balance. This Court's review and clarification of the *Enterprise Wheel* principles in the present case would provide the guidance to reviewing federal courts necessary to prevent enforcement of awards based on an arbitrator's amendment of or, as here, excision of contract provisions contained in, the underlying agreement, where only a contrived narrow reading without regard to the actual terms in the agreement would permit the conclusion that the award "drew its essence from the contract."

In the words of Professor Meltzer, arbitration should not be able to conscript judicial power while denying judicial responsibility. *Meltzer*, *supra*, at 566. The limited review and clarification requested here will strengthen the institution of arbitration. *Id.*

CONCLUSION

For the above-stated reasons, petitioner respectfully submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

IRA MICHAEL SHEPARD *
PAUL MONROE HEYLMAN
NANCY LEE MORAN
SCHMELTZER, APTAKER & SHEPPARD, P.C.
Suite 500
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-1000
Counsel for Petitioner Manhattan Coffee Company

* Counsel of Record

February 28, 1985

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 83-2362-EM

No. 83-2428-EM

MANHATTAN COFFEE COMPANY,
Appellant-Cross Appellee,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 688,
Appellee-Cross Appellant.

Consolidated Appeal from the
United States District Court
for the Eastern District of Missouri

Submitted: May 14, 1984

Filed: September 18, 1984

Before McMILLIAN, BENNETT,* and ARNOLD, Circuit Judges.

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* The Hon. Marion T. Bennett, United States Circuit Judge for the Federal Circuit, sitting by designation.

BENNETT, Circuit Judge.

This case is on appeal from the judgment of the district court[1] which enforced an arbitration award under the terms of a collective bargaining agreement. A cross-appeal was filed from the refusal of the district court to allow attorney's fees to the prevailing party. We affirm.

The essential facts are undisputed. The Manhattan Coffee Company (the company) and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 688 (the union), are parties to a collective bargaining contract covering the company's office and clerical workers for the period July 1, 1982 through June 30, 1985. A separate but similar contract covers the company's warehouse and service maintenance workers. The main bone of contention now is Article 28 of the grievant's contract, entitled "Subcontracting":

> The Employer agrees that no function or service presently performed, or hereafter assigned, to the bargaining unit shall be subcontracted, leased, assigned or conveyed in whole or in part to any other person or organization, if any member of the bargaining unit is, at the time of such action, on layoff due to lack of work. The Employer agrees that the layoff proviso shall not be applicable until July 1, 1983.
>
> The above language shall not be construed or interpreted to prohibit the Employer from adding or discontinuing manufacture, packaging, or processing of a product or performance of a service based on sound business considerations.

Before July 1, 1983, the payroll and accounts payable functions were performed by the office and clerical unit of the company. On July 26, 1982, an employee, Patricia

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[1] The Hon. John F. Nangle, Chief Judge, United States District Court for the Eastern District of Missouri.

A. Schwenck, covered by the collective bargaining agreement, initiated a grievance while she was on layoff which alleged a contract violation by transfer of her work out of the bargaining unit to the production facility of the parent corporation in Oklahoma City.

The grievance was denied on July 27, 1982. There was a dispute as to whether the employee thereafter timely pursued proper procedures to appeal the denial. The matter went to arbitration before an impartial arbitrator, Richard L. Ross, who conducted a hearing and on January 14, 1983, issued his opinion and award sustaining the grievance both as to arbitrability and on the merits. The arbitrator ordered the company to cease transferring the office bargaining unit work to the Oklahoma City plant and awarded grievant back pay from the date she filed the grievance.

The arbitrator specifically found that the company's decision to transfer the payroll and accounts payable work was taken in good faith and was based on sound business considerations. The company was suffering because of severe economic problems and decided to cease the production of coffee in St. Louis. Sales volume had decreased by 65 percent even though the number of employees remained the same. The company and the union agreed that Manhattan would continue in St. Louis as a distribution warehouse, a service department, and an office, with a substantial reduction in personnel. The plan was implemented on June 30, 1983. With respect to the office, in issue here, the staff was reduced from ten to five. Four St. Louis employees were given severance pay and were terminated. Grievant was placed on layoff at her election because, with her seniority, she expected to be the first recalled if needed.

Issues of procedural arbitrability decided by the arbitrator and the district court are not before us. The substantive issue on appeal arises because, while the arbitrator found that the company's action in transferring

the payroll and accounts payable work to its home office master computer in Oklahoma was taken in good faith and was based on "sound business considerations," the latter exception to the subcontracting clause in Article 28 did not apply to the office and clerical unit but applied only to work performed by warehouse and equipment repair unit employees who were covered by a similar but separate contract.

The appeal challenges this interpretation of Article 28 as a "legal impossibility," arrived at *sua sponte* by the arbitrator without evidence in the record to support the conclusion that the "sound business considerations" exception, expressly included in the office and clerical unit contract at Article 28, was not intended to apply to the office and clerical unit. The company inquires how the exception can be considered surplusage in this case and apply only in the other contract. The company submits that the arbitrator has amended the contract and thus exceeded his authority, and that his award, affirmed by the district court, does not draw its essence from the contract.

The contract on its face appears to apply only to office and clerical employees, and it must be conceded that courts are not to redetermine the merits of an arbitration award but rather to determine whether the award draws its essence from the collective bargaining agreement. *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); *United Food & Commercial Workers, Local No. 222* v. *Iowa Beef Processors, Inc.*, 683 F.2d 283, 285 (8th Cir. 1982). Of course, the arbitrator cannot amend the contract, although he can construe ambiguous contract language if there is any. He cannot substitute his discretion for that of the parties, and he cannot assume existence of facts central to the award if there is no support therefor in the record. *Timken Co.* v. *Local Union No. 1123, United Steelworkers of America*, 482 F.2d 1012 (6th Cir. 1973).

The company states the law in the decided cases correctly in support of its argument that the arbitrator and the district court have misapplied the law in the instant case. The opinion of the district court concedes that the language of the Article 28 exception for "performance of a service" could "arguably cover the work performed by the office unit." But, the court upheld the arbitrator's construction of the phrase as one relating only to the work performed by the service department. Our task is to determine whether this was a reasonable construction of the contract language. We state it again, in pertinent part, with added emphasis:

> The above language shall not be construed or interpreted to prohibit the Employer from adding or discontinuing manufacture, packaging, or processing of a product or *performance of a service* based on sound business considerations. (Emphasis added.)

The arbitrator saw the underscored phrase in connection with the rest of the sentence pertaining to manufacture, packaging, and processing of the product, and concluded that the performance of a service must relate thereto and to the service unit and not to answering the telephone and to clerical work in the office as performed by the grievant. This is a narrow reading of the contract language but it is not impermissible. Indeed, the narrow construction was justified on the ground that, since reference to other activities in the exception was so specific and office work was not mentioned, it was therefore intended that it not be included. The district court found the language to be "ambiguous and subject to conflicting reasonable interpretations when applied to the bargaining unit," but found that the arbitrator's interpretation nevertheless drew its essence from the contract. We agree. To the extent that the decision under review also relied on "bargaining and negotiation history," we find it wanting in the record.

Having approved the conclusion of the district court that the arbitrator was correct in finding that the parties agreed to the transfer of production and service work but not to the transfer of office work, and that the transfer of work out of the office bargaining unit was violative of Article 28, we do not find it necessary, as the district court did not, to address other issues raised as to the contract language.

Back Pay.

The district court affirmed the arbitrator's award of back pay and it is not specifically challenged on appeal in the company's briefs. As with the main substantive issue of this case, any doubts are to be resolved in favor of the validity of the arbitrator's award. Judicial review of an arbitrator's award is extremely limited and if the award draws its essence from the collective bargaining agreement, it must be enforced even if the court would have reached a contrary result had it considered the matter in the first instance. These concepts flow from the strong and long-standing public policy favoring collective bargaining and arbitration of labor disputes, as shown in the statutes, 9 U.S.C. §§ 9, 10, 11, 29 U.S.C. § 171 (1982), and reiterated many times in judicial decisions. *See Nolde Brothers* v. *Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 254 (1977); *Steel Workers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. at 599; *Iowa Beef Processors, Inc.* v. *Amalgamated Meat Cutters & Butcher Workmen of North America*, 627 F.2d 853, 856 (8th Cir. 1980); *Chauffeurs, Teamsters & Helpers Local No. 878* v. *Coca-Cola Bottling Co.*, 613 F.2d 716, 717 (8th Cir. 1980). We affirm the district court's judgment for back pay.

Attorney's Fees and Costs.

The district court awarded the union its costs but denied it attorney fees. The union has cross-appealed for

the fees and seeks a remand. The district court found that while the company's case was without merit, it was not frivolous. The arbitrator had found that the company's action had been taken in good faith and for efficiency and sound business reasons to save the company money at a time when it was in financial distress. The award or denial of attorney fees is a matter within the sound discretion of the trial court, absent abuse of that discretion. *General Drivers & Helpers Union No. 554* v. *Young & Hay Transportation Co.*, 522 F.2d 562, 568 (8th Cir. 1975). We find no abuse of judicial discretion here.

Affirmed.

McMILLIAN, Circuit Judge, concurring in part and dissenting in part.

I agree with the majority opinion that, to the extent the arbitrator's decision relied upon "bargaining and negotiation history," it is not supported by the record. I do not agree that the language of Article 28 is ambiguous, that the exception in Article 28 applies only to the production unit and not the office unit, or that the arbitrator's decision draws its essence from the collective bargaining agreement. For these reasons, I would reverse the judgment of the district court and remand with directions to the district court to dismiss the union's request for attorney's fees and costs.

The union is the bargaining representative for company employees in two separate bargaining units: the production unit, covering warehouse and service maintenance workers, and the office unit, covering office and clerical workers. Separate but similar collective bargaining agreements cover each bargaining unit. The collective bargaining agreement for the office unit is identified as such by the term "Office" on the cover page. *See* Ex. A. Article 3, sec. 1 of the collective bargaining agreement recognizes the union as the bargaining representative for "all of the office and clerical employees of the Employer, except buyers, salesmen, solicitors, confidential secretaries and pricing employees, executives, supervisors, and all others." The collective bargaining agreement for the office unit does not refer to the production unit and the two collective bargaining agreements are not by their terms interdependent.

Article 28 and the exception at issue are set forth in the majority opinion. Because this collective bargaining agreement covers *only the office unit*, I cannot agree with the arbitrator's construction of the phrase "performance of a service" in the exception to apply to work performed by service department employees *in the production unit*.

I admit that the parties could and should have used more specific terms when drafting this Article and the exception. Nonetheless, this collective bargaining agreement specifically covers the office unit employees and *in that context* I conclude that the exception must apply to the company's transfer of the payroll and accounts payable work. It is undisputed that the company transferred this work in good faith and on the basis of "sound business considerations." For these reasons, I believe the arbitrator has in effect amended the parties' contract and therefore the arbitrator's decision cannot be said to draw its essence from the collective bargaining agreement.

I would reverse the judgment of the district court.

A true copy.

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

September Term, 1984

Nos. 83-2362/2428-EM

MANHATTAN COFFEE COMPANY,
Appellant/Cross Appellee,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 688,
Appellee/Cross Appellant.

Appeals from the United States District Court
for the Eastern District of Missouri

Appellant/cross appellee's petition for rehearing en banc has been considered by the Court and is denied.

Judges Ross, McMillian, Fagg and Bowman would have granted the petition.

Petition for rehearing by the panel is also denied.

October 31, 1984

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-838C(1)

MANHATTAN COFFEE COMPANY,
Plaintiff,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 688,
Defendant.

[Filed Sep. 12, 1983]

MEMORANDUM

This case is now before this Court on cross-motions for summary judgment. Both parties assert that they are entitled to summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, because there are no genuine issues of material fact and they are entitled to judgment as a matter of law. *Fed.R.Civ.P.* 56.

1. *The Facts:*

Plaintiff brought this action seeking to set aside and vacate the award of an impartial arbitrator. Defendant filed a counterclaim seeking enforcement of the arbitrator's award and attorney's fees. Plaintiff and defendant

filed cross-motions for summary judgment which purport to dispose of both plaintiff's claim and defendant's counterclaim.

Plaintiff and defendant are parties to a collective bargaining contract covering plaintiff's office and clerical workers for the period July 1, 1982, through June 30, 1985. A separate collective bargaining contract covers plaintiff's warehouse and service maintenance workers. Article 28 of the contract, entitled "SUBCONTRACTING", provides:

> The Employer agrees that no function or service presently performed, or hereafter assigned, to the bargaining unit shall be subcontracted, leased, assigned or conveyed in whole or part to any other person or organization, if any member of the bargaining unit is, at the time of such action, on layoff due to lack of work . . . . The above language shall not be construed or interpreted to prohibit the Employer from adding or discontinuing manufacture, packaging, or processing of a product or performance of a service based on sound business considerations.

Article 18 of the contract provides for a four step grievance procedure. Step 1 requires that a grievance be filed with the employer within five (5) days of the occurrence. Step 2 requires the employer to rule on the grievance within five (5) days after receipt of same. Step 3 provides that if the grievance is not settled by steps 1 or 2, "it shall be submitted to a two (2) man Adjustment Board within three (3) working days." Art. 18, § 3. Finally, step 4 provides that the parties shall submit the grievance to arbitration if the Union so requests. If the matter is submitted to arbitration, the arbitrator:

> shall be limited to interpretation and application of this Agreement in any of its particulars, and any decision rendered within the scope of such limitation shall be final and binding on the parties of the agreement. Art. 18, § 6.

Prior to July 1, 1983, the payroll and accounts payable functions were performed by the office and clerical unit. On July 26, 1982, Patricia A. Schwenck (Grievant), an office employee covered by the parties' collective bargaining agreement, initiated a grievance. Grievant alleged that plaintiff had violated the contract by transferring the payroll and accounts payable work out of the bargaining unit, to the office of the parent corporation in Oklahoma City, while she was on layoff.

On July 27, 1982, plaintiff denied the grievance in writing, thus completing steps 1 and 2 of the grievance procedure. In addition, on July 27, 1982, grievant spoke on the telephone with her supervisor. The supervisor had called grievant to inquire why she had filed the grievance. Grievant responded by inquiring as to when a meeting, which was supposed to have been held within six (6) weeks after the contract went into effect on July 1, 1982, was going to be held.[1] The supervisor was unable to answer grievant and requested that she "sit tight" until Monday, August 2, 1982.

On Thursday, August 5, 1982, grievant requested that plaintiff waive step 3 of the grievance procedure and go directly to arbitration. On August 9, 1982, plaintiff refused to forego step 3 and informed defendant that grievant's time to request a step 3 two (2) man adjustment board had expired. Nevertheless, a two-man adjustment board meeting was held on August 25, 1982, but the board failed to resolve the grievance. Although plaintiff maintained that the grievance was not arbitrable, because steps 1 and 3 were not taken by grievant within the time

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[1] The new contract, effective July 1, 1982, resulted in several major changes in the size and composition of the bargaining units at plaintiff's St. Louis facility. Most notably, all production work was transferred to plaintiff's parent corporation and several warehousemen, servicemen, and office workers were laid off. The purpose of the six-week meeting was to assess the success of the new arrangement.

required by Article 18 of the contract, the parties agreed to submit the issue of arbitrability and the substantive contract issue to arbitration.

Richard L. Ross was the impartial arbitrator, and he conducted a hearing on the matter on December 7, 1982. On January 14, 1983, he issued his Opinion and Award sustaining the grievance as to both arbitrability (i.e., timeliness) and the merits. He ordered plaintiff to cease and desist from transferring the office bargaining unit work to plaintiff's parent corporation's offices. In addition, he awarded grievant backpay from the date of filing her grievance. *See Manhattan Coffee Company v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 688*, Jan. 14, 1983 (Ross, Arb.) (hereinafter "Arb. Op.").[2]

2. *The Law:*

The scope of judicial review of arbitrators' awards is extremely limited, because there is a strong federal policy favoring the non-judicial resolution of labor disputes. *Nolde Brothers, Inc., v. Bakery Workers Local 358*, 430 U.S. 243, 253-54 (1977); *Iowa Beef Processors v. Meat Cutters*, 627 F.2d 853, 856 (8th Cir. 1980); *Teamsters Local 878 v. Coca-Cola Bottling Company*, 613 F.2d 716, 717 (8th Cir. 1980); *Kewanee Machinery Division v. Teamsters Local 21*, 593 F.2d 314, 316-17 (8th Cir. 1979). The function of a reviewing court is not to redetermine the merits of the dispute, but rather to decide whether the arbitrator's award "draws its essence" from the contract. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596-97 (1960); *United Food and Commercial Workers Local 222 v. Iowa Beef Processors, Inc.*, 683 F.2d 283, 285 (8th Cir. 1982). So long as the award has a rational basis rooted in the collective bargaining agreement, it must be enforced even if the court would have

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[2] For a more detailed description of the facts, *see Arb. Op.* at 2-6.

reached a contrary result had it considered the matter in the first instance. *Nolde Brothers, Inc., v. Bakery Workers Local 358, supra,* at 253-54; *Steelworkers v. Enterprise Wheel & Car Corp., supra,* at 599.

3. *Opinion:*

Plaintiff contends that the arbitration award must be set aside and vacated for three reasons: 1) the matter was not arbitrable because grievant did not comply with the time limits for processing her grievance; 2) the transfer of the office unit work did not violate the contract and the arbitrator's contrary conclusion resulted in an unlawful modification of the contract; and 3) the award of backpay was unwarranted because defendant expressly disclaimed any right to backpay for grievant. In addition, if summary judgment is entered in favor of defendant, plaintiff contends that defendant is not entitled to an award of attorney's fees by this Court, because plaintiff's initiation of this action was not in bad faith.

a) *Procedural Arbitrability:*

Plaintiff contends that the grievance was not arbitrable because steps 1 and 3 of the grievance procedure were not processed by grievant within the required time limits. The arbitrator held that the grievance was arbitrable because he found that step 1 was not processed late and that the untimeliness of step 3 was expressly waived by plaintiff. *Arb.Op.* at 7-10.

With respect to step 1, plaintiff argues that the grievance occurred on July 1, 1983, when plaintiff initially transferred the office work and, therefore, grievant's filing of her grievance on July 26, 1982, was not within five (5) days of the "occurrence" as required by Article 18, § 1. The arbitrator held that the transfer, if it was in violation of the contract, was a continuing "occurrence". *Arb.Op.* at 8. Therefore, the grievance filed on July 26, 1982, was timely. *Id.*

The arbitrator's interpretation of the term "occurrence" as it appears in Article 18, § 1 of the contract is a reasonable one. It is also supported by the facts and the evidence presented to the arbitrator. Moreover, the arbitrator's award of backpay was limited to from and after July 26, 1982, rather than July 1, 1982. Therefore, the arbitrator's conclusion that the grievance was procedurally arbitrable with respect to step 1 is upheld.

With respect to step 3, plaintiff argues that the finding that plaintiff waived the deliquency of step 3 both contravenes an express limitation in the contract and is without foundation in the facts. The arbitrator relied on several factors in reaching his conclusion that plaintiff waived the time requirements of step 3. These factors include: 1) the fact that a meeting was scheduled for six (6) weeks from the effective date of the contract, July 1, 1982, to discuss any problems related to the new arrangement; 2) the fact that grievant's supervisor told her to "sit tight" with regard to her grievance and the six-week meeting; and 3) the fact that plaintiff had actual notice of grievant's grievance. *Arb.Op.* at 9-10. In addition, the arbitrator relied on previous arbitration decisions to the effect that "discussion of the merits of a grievance waives the right of a party to rely on the technical procedural provisions of the contract." *Arb.Op.* at 9.

The arbitrator's finding that plaintiff waived the timeliness of step 3 is a reasonable finding based on the facts presented to him. The facts that the six-week meeting was intended to address problems closely related to grievant's grievance and that her supervisor told her to "sit tight" are a sufficient basis from which a waiver may be inferred. In addition, as the arbitrator noted, there is an ambiguity in the contract as to who holds the responsibility for submitting a grievance to the two-man adjustment board under step 3. *Arb.Op.* at 10. Under these circumstances, the arbitrator's finding of waiver is reasonable and is upheld.

Plaintiff's argument that the finding is invalid because it contravenes an express limitation in the contract fails to appreciate the nature of a waiver. Because plaintiff expressly waived the time limitation in step 3, plaintiff cannot be heard to rely on said limitation.

Finally, this Court notes that issues of procedural arbitrability are as much within the special competence of arbitrators as issues of substantive merit. *John Wiley & Sons, Inc., v. Livingston*, 376 U.S. 543, 557 (1964); *Automotive, Petroleum and Allied Industries Employees Union, Local No. 618, v. Town and Country Ford*, 709 F.2d 509 (8th Cir. 1983). *See also Ottley v. Sheepshead Nursing Home*, 688 F.2d 883, 890-1 (2d Cir. 1982) (refused to set aside arbitration award where arbitrator implicitly found that employer waived objection to timeliness of grievance). Because the arbitrator's conclusion that the grievance was procedurally arbitrable was both supported by the facts and was not unreasonable, this Court declines to vacate the arbitrator's award on the asserted ground that the grievance was not arbitrable.

b) *Substantive Merits:*

Plaintiff next contends that the arbitration award must be vacated, because the arbitrator's finding that plaintiff violated the contract when it transferred office work to Oklahoma City does not draw its essence from the contract and in fact results in an unlawful modification of the contract. The arbitrator held that the work transfer constituted a violation of the contract because the "sound business judgment" exception to the contract prohibition against work transfers did not apply to the work of the office of [sic] clerical unit. *Arb.Op.* at 10-14.

As discussed, *supra*, Article 28 of the contract prohibited the employer from subcontracting, leasing, assigning or conveying bargaining unit work while a unit member was on layoff. The prohibition also contains an exception for "adding or discontinuing manufacture, packaging, or proc-

essing of a product or *performance of a service* based on sound business considerations." (emphasis added). The arbitrator expressly found that the work transfer was based on sound business considerations. *Arb.Op.* at 11. However, he also found that the exception was not intended to apply to office unit work. *Id.* at 12. The arbitrator reasoned that the exception does not refer to the type of work regularly performed by the office staff. *Id.*

Although the language "performance of a service" could arguably cover the work performed by the office unit, the arbitrator rejected this construction. *Id.* He construed "performance of a service" to be limited to the work performed by the service department, *id.* at 12-13, and justified his construction on the ground that the other activities in the exception were very specific, such as manufacturing, packaging, product processing, and did not include office or clerical work. *Id.* Noting that "to expressly include one or more of a class must be taken as an exclusion of all others", *id.* at 12, the arbitrator concluded that a narrow construction of "performance of a service" was intended. He also justified his construction of the language by looking to the prior bargaining and negotiation history and finding an intention not to permit a transfer of office unit work. *Id.* at 13-14.

Having reviewed the briefs of the parties, the arbitrator's opinion and the contract itself, this Court is of the opinion that the arbitrator's construction of the contract is reasonable and supported by the facts. The language of the exception in Article 28 is ambiguous and subject to conflicting, reasonable interpretations when applied to the office bargaining unit.[3] In light of the ac-

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[3] It is also worth noting that it is not at all clear that the transfer of office unit work to another city falls within the activity permitted by the "sound business" judgment exception, namely "adding or discontinuing" the types of work enumerated. A reasonable interpretation of "discontinuing" is that it is intended to cover the situation where the employer no longer engages in or has a need for the types of activity enumerated. Because the payroll and accounts

companying terms of the exception and the bargaining history, it is not unreasonable to read "performance of a service" as not encompassing the work performed by the office employees. Because the arbitrator's conclusions with regard to violations of the contract draw their essence from the contract, they will not be disturbed or vacated by this Court.

c) *Award of Backpay:*

Plaintiff next takes issue with the arbitrator's award of backpay to grievant. Plaintiff contends that grievant is not entitled to backpay because grievant did not request it and because the union "specifically conceded that it had no right to such a remedy." *Plaintiff's Memorandum* at 11.

The arbitrator, however, states in his opinion that: "[Grievant]demanded full back pay and recall." *Arb.Op.* at 5. Because plaintiff has not directed this Court to any evidence that the arbitrator was corrupt, guilty of fraud or evident impartiality, 9 U.S.C. § 10, there is no basis for concluding that the award of backpay is so unreasonable that it should be set aside. Plaintiff does refer this Court to a passage in defendant's brief to the arbitrator, which brief is not before this Court, in which the union allegedly admits that it is not entitled to backpay for grievant. However, plaintiff also concedes that the arbitrator refused to consider defendant's brief because it was not timely filed. *Plaintiff's Memorandum* at 11. Therefore, any concession by the union, if there was one, was not before the arbitrator. Accordingly, the arbitrator's award of backpay was within his authority and this Court will not upset his reasonable exercise of that authority.

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payable work was not necessarily "discontinued" by plaintiff, but was merely transferred to the employees in the offices of its parent corporation, this is another permissible justification for the arbitrator's result, even though the arbitrator did not so justify his decision.

3) *Attorney's Fees and Costs:*

The final matter for consideration is defendant's claim for attorney's fees and costs in connection with the cause before this Court. Although defendant's argument that the present action defeats the purpose of submitting labor disputes to arbitration is appealing and pertinent, this Court is of the opinion that plaintiff's conduct is not so lacking in good faith as to require them to pay defendant's attorney's fees. Plaintiff's contentions were essentially meritless, but not quite frivolous. Accordingly, defendant's claim for attorney's fees is denied, but defendant's claim for costs is granted. *See Fed.R.Civ.P.* 54(d).

4. *Conclusion:*

The essential benefit of mandatory and binding arbitration clauses is the conservation of scarce judicial time and effort. Such benefit was not achieved in the instant case. Plaintiff is admonished to give more serious consideration to the scope of this Court's power to review arbitration awards, or else plaintiff may find itself paying defendant's attorney's fees in future such actions.

It is the judgment of this Court that the award of the arbitrator in this case is reasonable and draws its essence from the contract of the parties. Plaintiff is therefore ordered to comply with the award *in toto*. Defendant's claim for attorney's fees is denied. Defendant's claim for costs is granted. Plaintiff's motion for oral argument is denied pursuant to Local Rule 7(a). *E.D.Mo.R.* 7(a).

/s/ John F. Nangle
United States District Judge

Dated: September 12, 1983

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-838C(1)

MANHATTAN COFFEE COMPANY,
Plaintiff,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 688,
Defendant.

[Filed Sep. 12, 1983]

ORDER

Pursuant to the memorandum filed herein this day,

IT IS HEREBY ORDERED that plaintiff's motion for summary judgment be and is denied.

IT IS FURTHER ORDERED that defendant's motion for summary judgment be and is granted.

IT IS FURTHER ORDERED that plaintiff comply *in toto* with the arbitrator's award in this case.

IT IS FURTHER ORDERED that defendant's claim for attorney's fees in connection with this action be and is denied.

IT IS FURTHER ORDERED that plaintiff's motion for oral argument be and is denied pursuant to Local Rule 7(a). *E.D.Mo.R.* 7(a).

IT IS FURTHER ORDERED that plaintiff pay defendant's costs in connection with this cause.

IT IS FURTHER ORDERED that summary judgment be and is entered for defendant and against plaintiff on both plaintiff's complaint and defendant's counterclaim.

IT IS FURTHER ORDERED that the parties' motions to remove this case from the trial docket be and are granted.

IT IS FURTHER ORDERED that the parties' motions for oral argument be and are denied pursuant to Local Rule 7(A). *E.D.Mo.R.* 7(A).

/s/ John F. Nangle
United States District Judge

Dated: September 12, 1983

APPENDIX E

AGREEMENT

Between

MANHATTAN COFFEE COMPANY
ST. LOUIS, MISSOURI

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN & HELPERS
OF AMERICA
Local Union No. 688

(Office)

July 1, 1982
through
June 30, 1985

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Article 3

RECOGNITION

Section 1. The Employer agrees to recognize and does hereby recognize the Union, its agents, representatives, or successors, as the exclusive bargaining agency for all of the office and clerical employees of the Employer, except buyers, salesmen, solicitors, confidential secretaries and pricing employees, executives, supervisors, and all others.

Section 2. The Employer will neither negotiate nor make collective bargaining agreements for any of its employees in the bargaining unit covered hereby unless it be through duly authorized representatives of the Union.

Section 3. The Employer agrees that it will not sponsor or promote, financially or otherwise, any group or labor organization, for the purpose of undermining the Union; nor will it interfere with, restrain, coerce, or discriminate against, any of its employees in connection with their membership in the Union.

Article 4

REPRESENTATION

The Union shall be represented by Shop Stewards, the number being based on one steward for each twenty-five (25) employees or major fraction thereof. The Shop Stewards shall serve as a Grievance Committee and they shall be selected in any manner determined by the Union. The names of the Stewards shall be certified in writing by the Union to the Employer within ten (10) days after the signing of this Agreement.

The Committee shall meet with Management as often as necessary to consider grievances. No Steward shall be transferred from his or her department without further consultation and agreement with the Committee.

Article 28

SUBCONTRACTING

The Employer agrees that no function or service presently performed, or hereafter assigned, to the bargaining unit shall be subcontracted, leased, assigned or conveyed in whole or part to any other person or organization, if any member of the bargaining unit is, at the time of such action, on layoff due to lack of work. The Employer agrees that the layoff proviso shall not be applicable until July 1, 1983.

The above language shall not be construed or interpreted to prohibit the Employer from adding or discontinuing manufacture, packaging, or processing of a product or performance of a service based on sound business considerations.

Article 29

STRIKES AND LOCKOUTS

Section 1. It is mutually agreed that there shall be no strikes, lockouts, or stoppages of work during the life of this Agreement. The Union shall use every effort to prevent cessation of work by any of its members employed by the Employer, for any case, but especially for the following reasons:

(1) Sympathy Strikes; and

(2) General Strikes

The Employer and the Union will work toward harmonious cooperation so that no provocation either on the part of the Union or Employer representatives may lead to any disruption of operations.

Section 2. The right of the Employer or the Union to seek injunctive relief in court against action in breach of the strike and lockout clause without submission to the grievance and arbitration procedures of this article is expressly recognized by the parties.

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FILED
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No. 84-1369

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MANHATTAN COFFEE COMPANY,
Petitioner,
vs.
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 688,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CLYDE E. CRAIG
WILEY, CRAIG, ARMBRUSTER
& WILBURN
1221 Locust Street, Suite 650
St. Louis, Missouri 63103
(314) 231-1018
Counsel for Respondent

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

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QUESTIONS PRESENTED

1. Whether the decision of the United States Court of Appeals for the Eighth Circuit below, which affirmed enforcement of a labor arbitrator's award holding that the award "drew its essence" from the applicable collective bargaining agreement, conflicts with the precedent of this Court to the grave detriment of the integrity of the arbitral process.

2. Whether this Court's principles governing judicial review of labor arbitrators' awards set forth 25 years ago in the *Steelworkers Trilogy* and, specifically, in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), are vague enough to enable reviewing courts to escape their mandated responsibility of ensuring that labor arbitrators' awards are faithful to the underlying labor agreement, and should be clarified to provide guidance to reviewing courts in order to avoid enforcement of labor arbitration awards based on an arbitrator's unilateral amendment or excision of a term of the underlying collective bargaining agreement.

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No. 84-1369

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STATEMENT OF THE CASE

I. Introduction

The original complaint in this case was filed by Manhattan Coffee Company (hereinafter "the Company") seeking to vacate an arbitration opinion and award issued by Arbitrator Richard L. Ross.[1] Teamsters Local Union No. 688 (hereinafter "the Union") filed a counterclaim for enforcement of the opin-

[1] A copy of the opinion and award is reproduced in the Appendix hereto.

ion and award and for attorney's fees and costs. The district court, following cross-motions for summary judgment, entered an order and memorandum enforcing the arbitrator's decision, granting the Union costs, but denying, with certain express reservations, the Union's request for attorney's fees. The Company appealed to the United States Court of Appeals for the Eighth Circuit seeking reversal of enforcement of the arbitrator's decision, and the Union cross-appealed seeking reversal of the district court's denial of attorney's fees and a remand. In a 2-1 panel decision the Eighth Circuit affirmed the district court. The Company requested a rehearing *en banc* which was denied by five of the nine judges.

II. Decisions of the Arbitrator, the District Court and the Court of Appeals

The essential facts in this case are set forth in the decision of the Eighth Circuit. *See* Petitioner's Appendix A, pp. 2a-3a.[2] The arbitrator held that the Company's transfer of office work violated Article 28 of the collective bargaining agreement notwithstanding language therein allowing a discontinuance of a "performance of service" which was "based on sound business considerations." His holding followed an interpretation that, although the Company's action was based on sound business considerations, the exclusionary language on "performance of a service" related to work of the "service" department, not that of the office staff. The arbitrator likewise found support for his holding in a review of the history of negotiations between the parties to the agreement.

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[2] The decisions of both the Eighth Circuit and district court refer in some instances to July 1, 1983 as the date by which the Company implemented a plan which included transfer of certain payroll and accounts payable functions previously performed by the office and clerical unit. *See* Petitioner's Appendix A, pp. 2a, 2b; Petitioner's Appendix C, pp. 13a, 15a. It is clear from the arbitrator's decision and its January 14, 1983 issuance date that the correct date in question was July 1, 1982. *See* Respondent's Appendix, pp. A-2, A-5, A-8, A-9, A-16. The error, however, is not material to the decision in the case.

The district court upheld the arbitrator's decision. It found the language of the exception in Article 28 "ambiguous and subject to conflicting, reasonable interpretations when applied to the office bargaining unit," and was of the opinion that "the arbitrator's construction of the contract [was] reasonable and supported by the facts." *Manhattan Coffee Co. v. International Brotherhood of Teamsters, Local No. 688*, 571 F.Supp. 347, 351 (E.D. Mo. 1983). The district court likewise found support for sustaining the arbitrator's decision in contract terms accompanying the exception to Article 28 and the parties' bargaining history. *Id.*

The majority of the Eighth Circuit panel affirmed the lower court's decision to enforce the award, although it found the record wanting in support of the arbitrator's reliance on a history of bargaining and negotiations. The panel majority viewed the arbitrator's reading of the "performance of service" language as narrow, but not impermissible, and justified in light of other language in the exception. On this basis, it agreed with the district court that the arbitrator's interpretation of ambiguous language drew its essence from the collective bargaining agreement. The dissenting panel member agreed with the majority that the record did not support the arbitrator's reliance on bargaining and negotiating history, but disagreed that the language of Article 28 was ambiguous or that the exception therein applied only to a unit of employees apart from the office unit. In the dissent's view, the arbitrator had in effect amended the contract, and his decision, accordingly, could not be said to have drawn its essence from the agreement.

ARGUMENT

I. The Decision Of The United States Court Of Appeals For The Eighth Circuit Does Not Conflict With The Precedent Of This Court Because The Arbitrator's Award Drew Its Essence From The Collective Bargaining Agreement And Did Not Amend The Agreement Or Excise A Proviso To The Subcontracting Clause Therein.

Federal policy strongly favors the arbitration of labor disputes. 29 U.S.C. § 173(d), *Nolde Brothers, Inc. v. Bakery Workers, Local 358,* 430 U.S. 243, 254 (1977); *Iowa Beef Processors, Inc. v. Meat Cutters,* 627 F.2d 853, 856 (8th Cir. 1980). Consequently, the scope of judicial review of an arbitrator's award is extremely limited. *Johns-Manville Sales Corp. v. Machinists, Local Lodge 1609,* 621 F.2d 756, 758 (5th Cir. 1980); *Western Electric Co. v. Communication Equipment Workers, Inc., Independent,* 554 F.2d 135, 138 (4th Cir. 1976). And all doubts are to be resolved in favor of the validity of the award. *Teamsters, Local 878 v. Coca-Cola Bottling Company,* 613 F.2d 716, 717 (8th Cir. 1980); *Kewanee Machinery Div. v. Teamsters, Local 21,* 593 F.2d 314, 316-317 (8th Cir. 1979). The proper approach for courts in considering these matters is refusal to review the merits of an arbitration award, and the award must be deemed legitimate if it "draws its essence from the collective bargaining agreement." *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597 (1960).

Under these standards, the Eighth Circuit's decision in this case was consistent with this Court's precedent. The substantive issue before the arbitrator was whether the Company violated its collective bargaining agreement with the Union when it transferred certain work out of a grievant's bargaining unit while she was on layoff. In deciding this issue against the Company, the arbitrator reached his conclusions by an analysis and interpretation of contract language in the context of the parties'

conduct. The Company contends that his analysis and interpretation manifested an infidelity to his obligations because he purportedly amended the parties' agreement by excising a proviso to the subcontracting clause. Whether the award drew its essence from the agreement in this case, therefore, turns on whether the arbitrator was engaged in legitimate interpretation or an invalid rewriting of the agreement. Respondent submits that the Eighth Circuit correctly viewed the arbitrator's opinion and award as an exercise of legitimate interpretation, and thus correctly concluded that the award drew its essence from the collective bargaining agreement.

In *United Steelworkers v. Enterprise Wheel & Car Corp.*, this Court recognized that arbitrators could exceed their powers in going beyond legitimate interpretation and application of an agreement, and cautioned against approval of such an abuse of authority:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement he is to bring his informed judgment to bear in order to reach a fair solution of a problem...Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice...When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. 363 U.S. at 597.

The appellate courts have heeded this caution in circumstances where an arbitrator's "interpretation" of an agreement was in reality an abandonment of it. Thus, awards have been set aside or remanded for further scrutiny where the arbitrator read into a contract an implied provision to which the parties had not agreed, *Torrington Co. v. Metal Products Workers, Local 1645*, 362 F.2d 677 (2nd Cir. 1966); where the arbitrator disregarded express contract language authorizing a company's actions

because the arbitrator viewed the action as punitive, *Amanda Bent Bolt Company v. United Auto Workers, Local 1549,* 451 F.2d 1277 (6th Cir. 1971); where the arbitrator substituted his own definition of "quit" for the contract's definition, *Timken Co. v. Local Union No. 1123, United Steelworkers of America,* 482 F.2d 1012 (6th Cir. 1973); where the arbitrator declared the contract from which he derived his power legally ineffective, *International Ladies' Garment Workers' Union v. Ashland Industries, Inc.,* 488 F.2d 641 (5th Cir. 1974), *cert. denied* 419 U.S. 840 (1975); where the arbitrator added to the contract a requirement of progressive discipline before recourse to a contractually authorized immediate discharge, *Mistletoe Express Service v. Motor Expressmen's Union,* 566 F.2d 692 (10th Cir. 1977); where the arbitrator, among other excesses, expanded the scope of the usual meaning of "notified" and declared that to deny arbitrability would lead to a deterioration of the parties' good relations, *Detroit Coil Co. v. International Association of Machinists & Aerospace Workers, Lodge No. 82,* 594 F.2d 575 (6th Cir.), *cert. denied,* 444 U.S. 840 (1979); where the arbitrator, after finding insubordination, disregarded clear contract language which allowed discharge for insubordination, and imposed an unwarranted additional burden of proof on the company to justify its contractually authorized right to discharge an employee for insubordination, *International Brotherhood of Firemen & Oilers, Local No. 935-B v. The Nestle Company, Inc.,* 630 F.2d 474 (6th Cir. 1980); where the arbitrator applied a "balancing test" on relative economic cost to the union and company of subcontracting, notwithstanding specific contract language which established the only test for subcontracting as whether the work could be more efficiently and economically done outside the bargaining unit, *Sears, Roebuck & Co. v. Teamsters, Local Union No. 243,* 683 F.2d 154 (6th Cir. 1982), *cert. denied,* 460 U.S. 1023 (1983); and, where the arbitrator introduced extraneous legislative considerations in support of his award, *Bacardi Corp. v. Congreso de Uniones,* 692 F.2d 210 (1st Cir. 1982).

In the present case, the arbitrator avoided such excesses and confined himself to a consideration of ambiguous language on "performance of a service" as it applied to the subcontracting of work performed by grievant's bargaining unit. In so proceeding, he concluded from a consideration of the parties' prior discussions on contemplated transfers of work and other language within the proviso itself that the "service" in question was work performed by another bargaining unit also represented by the Union. The Company construes the arbitrator's conclusion as a rewriting, by excision, of the contract covering the office bargaining unit on the false premise that any language which appears in that agreement must, by virtue of its inclusion, directly refer to the bargaining unit covered by the agreement. It conveniently ignores the fact that language regarding "...manufacture, packaging, or processing of a product..." also appears in the same proviso; and it characterizes the arbitrator's interpretation that the "performance of a service" language similarly refers to non-bargaining unit work as an "amendment" to the contract by way of eliminating any meaningful relevance of the disputed language to the office unit.

Such a characterization was properly rejected by the Eighth Circuit under the standard of review set forth by this Court—determining whether the arbitrator reached a rational conclusion based on the terms of the collective bargaining agreement. *United Steelworkers v. Enterprise Wheel & Car Corp., supra,* at 597. The facts before the arbitrator indicated that the parties may have had particular reasons to include language in the office agreement which applied to another bargaining unit comprised of production, warehouse, and service workers. The uncontroverted evidence before the arbitrator was that the Union and the Company were parties to two agreements covering two separate bargaining units. It is reasonable to infer that the parties were aware that the language contained in one agreement might have an impact on the meaning given to language contained in the other agreement. Therefore, it was not unlike-

ly that they would include language in the office agreement to specifically clarify their respective rights and obligations under the production agreement. And the arbitrator's conclusion that the disputed language was so included was reasonable.

His ruling, contrary to the Company's contention before this Court, was not that the provision in question had no meaning or application in the office collective bargaining agreement and was obliterated. The issue before before him was not merely whether there were sound business considerations justifying the subcontracting in question, but, even given an affirmative finding on this question, whether the "performance of a service" referred to in the proviso in Article 28 was identical to the "service presently performed, or hereafter assigned, to the bargaining unit" mentioned above in the Article. The Eighth Circuit correctly recognized that the arbitrator's construction that the two "services" in question were not identical was a permissible and justified, if narrow, construction of the contract's language.

Under well established standards set forth by this Court in *Enterprise Wheel, supra,* at 596, and reiterated in *W. R. Grace & Co. v. Rubber Workers, Local 759,* 461 U.S. 757, 764 (1983), a federal court cannot set aside an arbitrator's award simply because the court believes its own interpretaion would be better than the arbitrator's. The Eighth Circuit has recognized this limitation on its role in reviewing such awards. *Lackawanna Leather Company v. United Food & Commercial Workers International Union,* 706 F.2d 228, 232 (8th Cir. 1983). It sustained the award in the present case because it properly recognized that to deny enforcement would be to substitute its interpretation of ambiguous contract language for the arbitrator's. Its decision was thus entirely consistent with the precedent of this Court that an award must be enforced if it draws its essence from the collective bargaining agreement.

If, as Petitioner contends, the arbitrator had rewritten the parties' agreement by deleting one of its provisions, the decision of the Eighth Circuit in this case would indeed have been con-

trary to this Court's precedent in *Enterprise Wheel*. The arbitrator here, however, did nothing more nor less than decide that one of several exceptions to a prohibition against subcontracting bargaining unit work did not apply in the circumstances presented for his resolution. In sustaining his award, the decision of the Eighth Circuit does not conflict with this Court's standards for review of arbitral awards.

II. The Supreme Court's Principles Governing Judicial Review Of Arbitration Awards Are Sufficiently Clear To Enable Reviewing Courts to Ensure That Labor Arbitrators' Awards Are Faithful To Labor Agreements And Do Not Need Clarification Through A Review Of The Present Case To Avoid Enforcement Of Awards Which Undermine Those Agreements.

Although twenty-five years have passed since this Court enunciated standards for review of arbitration awards, the principles set forth in the *Steelworkers Trilogy* remain viable as a guide for court considerations of requests for such review. *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steel Workers of America v. Enterprise Wheel & Car Corp., supra.* Those decisions affirmed a federal preference for binding arbitration as the method for resolving disputes arising over the interpretation and application of collective bargaining agreements among parties who have chosen this vehicle as the means for resolving conflicts. Because the parties in such instances bargain for an arbitrator's construction of their agreement, the courts should not substitute their judgment for the arbitrator's by reviewing the merits of a dispute properly brought before him for resolution. The effect of such plenary review would be to eliminate the very finality of resolution which the parties sought in choosing arbitration as the preferred method for settling differences over the meaning and effect of their agreement.

This preference for nonjudicial dispute resolution as a means to achieve industrial stability did not, however, divest the courts of all supervision over the performance of arbitrators. Inasmuch as the arbitrators' jurisdiction and scope of authority are rooted in the parties' collective bargaining agreements, the exercise of that authority in issuing arbitral decisions is subject to court review to ensure that arbitrators have remained faithful to their charter as interpreters of the meaning and application of those agreements, and to protect the parties against an abuse of power by arbitrators who set themselves above the parties and agreements by dispensing their own brands of industrial justice. Such a safeguard was ensured by this Court when it mandated that reviewing courts set aside any arbitral award which does not draw its essence from the underlying agreement, *United Steelworkers of America v. Enterprise Wheel & Car Corp., supra,* at 597.

Reviewing courts have variously identified how an award can be said to have drawn its essence from the collective bargaining agreement. An award which "put forward a passably plausible - even if perhaps erroneous - analysis" of the collective bargaining agreement was enforced by the Fifth Circuit. *Safeway Stores v. America Bakery and Confectionary Workers International Union,* 390 F.2d 79, 83 (5th Cir. 1968). The Third Circuit has stated:

> [W]e hold that a labor arbitrator's award does "draw its essence from from the collective bargaining agreement" if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing count disturb the award. *Ludwig Honold Mfg. Co. v. Fletcher,* 405 F.2d 1123, 1128 (3rd Cir. 1969).

The Ninth Circuit has stated that it will affirm an award "if, on its face, the award represents a plausible interpretation of the contract in the context of the parties' conduct." *Holly Sugar Corp. v. Distillery Workers International Union,* 412 F.2d 899, 903 (9th Cir. 1969). The Second Circuit has confirmed awards "when arbitrators explain their conclusions... in terms that offer even a barely colorable justification for the outcome reached." *Wire Service Guild, Local 222 v. United Press Internationa, Inc.*, 623 F.2d 257, 261 (2nd Cir. 1980), quoting *Andros Compania Maritima v. Marc Rich & Co., A.G.*, 579 F.2d 691, 704 (2nd Cir. 1978). The Tenth Circuit has required rational support and an absence of contrariety to express contract language as a basis for upholding an award. *Fabricut, Inc. v. Teamsters, Local 523,* 597 F.2d 227 (10th Cir. 1979). And it has approved an arbitrator's resolution of "tension" between extra-contractual shop rules and contract requirements for "good and sufficient cause" for discharge as a legitimate exercise of contract interpretation. *Campo Machinery Co., Inc. v. Local Lodge No. 1926,* 536 F.2d 330, 333 (10th Cir. 1976).

Decisions of the Eighth Circuit, including that in the present case, are consistent with decisions of other courts of appeal and the standards set forth by this Court. Citing with approval decisions of the Tenth and Sixth Circuits in *Campo Machinery Co. Inc., supra,* and *Timken Co., supra,* respectively, the Eighth Circuit affirmed enforcement of an award which resolved tensions between company rules and a contract provision on discharge, concluding that the award drew its essence from the collective bargaining agreement because the arbitrator simply interpreted two conflicting contract provisions. *Kewanee Machinery Div. v. Teamsters Local No. 21, supra,* at 318. In some instances, the same Circuit has held, an arbitrator's award must be sustained even if the arbitrator must technically go outside the four corners of an agreement to resolve a dispute arising under that agreement - in this case to a prior agreement, because the history of negotiations on the current agreement did not shed light on a grievant's current seniority rights, which had

vested under the prior agreement. *Rainbow Glass Co. v. Teamsters, Local 610,* 663 F.2d 814 (8th Cir. 1982). Unless the evidence gives a reviewing count positive assurance that a collective bargaining agreement is not susceptible to the arbitrator's interpretation, this Circuit will enforce the award. *Electrical Workers, Local 53 v. Sho-Me Power Corp.*, 715 F.2d 1322 (8th Cir. 1983). Framed in the positive, the Eighth Circuit will, as has the Third Circuit in *Ludwig Honold Mfg. Co., supra,* and the Tenth Circuit in *Fabricut, Inc., supra,* uphold an award if the arbitrator reaches a rational conclusion based on construction of the underlying collective bargaining agreement. *Lackawanna Leather Company v. United Food & Commercial Workers International Union, supra.*

This Court has recently reiterated its "well established standards for the review of labor arbitration awards":

> [A] federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be the better one. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). When the parties include an arbitration clause in their collective bargaining agreement, they choose to have disputes concerning constructions of the contract resolved by an arbitrator. Unless the arbitral decision does not "dra[w] its essence from the collective bargaining agreement," *Id.*, at 597, a court is bound to enforce the award and is not entitled to review the merits of the contract dispute. This remains so even when the basis for the arbitrator's decision may be ambiguous. *Id.*, at 598. *W.R. Grace & Co. v. Rubber Workes, Local 759, supra,* at 764.

The decision of the Eighth Circuit in the present case does not conflict with these standards. Petitioner argues that the arbitrator here rewrote the parties' agreement by excising the "sound business considerations" exception to the prohibition against subcontracting. Respondent submits that the focus of

the contention is misplaced. The excepting clause identifies several functions which can be added or discontinued, provided the addition or discontinuance is based on sound business considerations, without violating the restrictions against subcontracting office bargaining unit work. Adding or discontinuing any one of these functions, even though some or all of them involve work performed by employees outside the office bargaining unit, could arguably have an effect upon work performed by bargaining unit members. It is reasonable to infer from the juxtaposition of the prohibition clause and exception clause in Article 28 that the parties simply wanted to foreclose potential disputes over the prohibition against subcontracting bargaining unit work should the Company implement sound business decisions in other areas involving non-bargaining unit employees. When the arbitrator found that the disputed work transferred in this case was not the "performance of a service" mentioned in the exception clause, he was merely interpreting what he found to be ambiguous language in that clause. By virtue of the relationship between the prohibition clause and the exception clause, this meant that the transfer fell within the prohibition clause, and that the entire exception clause was inapplicable in this instance.

In this light, whether or not the Company's action was prompted by "sound business considerations" became irrelevant. Accordingly, the arbitrator need not have made a finding on the Company's motives in making the change. He had already found that the entire exception clause was inapplicable in the present context. The fact that he did make a finding on the Company's motives may have been frustrating to the Company in light of his more crucial finding that the disputed work was outside the scope of the exception clause. But the arbitrator did not thereby rewrite the agreement by excising the clause, or the proviso therein. Assuming evidence supports the conclusion, a finding that a particular clause in a collective bargaining agreement does not apply in the circumstances of a given dispute does not delete that clause from the agreement.

In rejecting the Company's argument that the arbitrator did excise a portion of the agreement in this case, the Eighth Circuit was thus not embarking on a novel approach to review of arbitral awards. The Ninth Circuit, for example, rejected a similar contention in *Edna H. Pagel, Inc. v. Teamsters, Local 595,* when it affirmed a lower court's confirming of an award where the arbitrator interpreted a prohibition against discharge to preclude permanent replacement of strikers. 667 F.2d 1275, 1279 (9th Cir. 1982). Petitioner, of course, disagrees with the Eighth Circuit's conclusion that the arbitrator in this case interpreted, however narrowly, but did not rewrite the contract. But there is no indication that the Eighth Circuit was confused by any uncertainty as to this Court's standards for review of arbitration awards. On the contrary, the decision specifically states that "the arbitrator cannot amend the contract." *Manhattan Coffee Company v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 688,* ____ F.2d ____ (8th Cir. 1984); Petitioners Appendix, p. 4a. Similarly, the Ninth Circuit in *Pagel* recognized the same caveat against sanctioning an arbitrator's refashioning of an agreement when it concluded:

> Certainly, an interpretation, which prohibits replacement "draws its essence" from the contractual bar against discharge, and whether or not we agree with this interpretation, we cannot say it is implausible or that it modified the contract. *Edna H. Pagel, Inc. v. Teamsters, Local 595, supra,* at 1279.

Petitioner suggests that the Sixth Circuit would have reached a different conclusion in this case, citing by way of example *Torrington Co. v. Metal Products Workers, Local 1645, supra,* and *International Brotherhood of Firemen & Oilers v. The Nestle Company, Inc., supra.* Respondent submits that the result would have been the same. In *Torrington,* the arbitrator was found to have added an implied provision to the agreement, a far different question from whether the arbitrator disregarded,

to the point of excising, the exception clause in this case. In *Nestle*, an award was vacated because the arbitrator's findings of facts which constituted insubordination had an immediate and direct bearing on whether a discharge was proper under an express provision justifying discharge for insubordination, whereas here, as was discussed above, the arbitrator's finding of "sound business considerations" was irrelevant to the arbitrator's holding once he found that the entire exception clause did not apply in this instance. Whatever the Sixth Circuit's conclusion would have been in this case, the standards set forth by this Court in the *Steelworkers Trilogy* and reiterated in *W.R. Grace & Co.* provide clear guidance for reviewing courts: courts may not substitute their interpretations for the arbitrator's; the merits of an award are not subject to review even when the basis for the award is ambiguous; and the award must derive its essence from the collective bargaining agreement in order to be sustained.

The appellate courts have found little difficulty in following these standards in reviewing arbitral awards. And the present case presents no novel departure from those standards which would warrant this Court's consideration of the case or justify redefinition of long established standards which have served the arbitral and review process well.

CONCLUSION

For the foregoing reasons, Respondent respectfully prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

Clyde E. Craig
Wiley, Craig, Armbruster & Wilburn
1221 Locust, Suite 650
St. Louis, Missouri 63103
(314) 231-1018

Counsel for Respondent

APPENDIX

APPENDIX

ARBITRATION OPINION AND AWARD

In the Matter of Arbitration Between:

Manhattan Coffee Company,
Employer

and

International Brotherhood Of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 688,
Union.

FMCS No. 82K/28920
File No. 8251

Richard L. Ross, Esquire
Arbitrator

Date of Hearing:
December 7, 1983

Place of Hearing:
St. Louis, Missouri

Grievant: Patricia Schwenck

APPEARANCES:

For the Employer: Mr. Ira Michael Shepard
Attorney at Law
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036

For the Union: Mr. Earl B. Wilburn
Attorney at Law
Suite 717 Buder Building
Market Street at Seventh
St. Louis, Missouri 63101

This is a matter of private arbitration between MANHATTAN COFFEE COMPANY (hereinafter sometimes referred to as "Company" or "Employer") and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, Local Union No. 688 (hereinafter sometimes referred to as "Union") in accordance with the Collective Bargaining Agreement between the parties. This arbitration arises from the filing of a grievance by PATRICIA SCHWENCK (hereinafter sometimes referred to as "Grievant") who alleges therein wrongful layoff. Under the arbitration procedures established by the parties, an "Arbitration Board" is created to which the Union and the Company each select one member. The undersigned was selected as the third member of the Arbitration Board under established procedure. Hearing was held on December 7, 1982 in St. Louis, Missouri. All parties appeared and were afforded full opportunity to examine and cross-examine witnesses and to present evidence and arguments in support of their respective positions.

FACTS

The Company for many years was engaged in the business of producing and distributing coffee and coffee products. In addition, the Company leased coffee-making equipment to commercial accounts and serviced said equipment. Until July 1, 1982, the Company employed in its St. Louis production warehouse and service facilities thirty-five members of the Union, and in its St. Louis offices, ten who were also members of the Union. The production workers were in one bargaining unit and the office workers in another bargaining unit. (Hereinafter the two units will sometimes be referred to as the "production unit" and the "office unit.") Grievant was employed for approximately twelve years in the office and was a member of the office unit. Grievant's duties included taking telephone orders for service calls and relaying the calls to the service department in the production unit, handling the documentation of "loan"

agreements with customers, and backing up the receptionist when necessary. Grievant spent approximately four hours each day taking orders for service calls and relaying messages to the service department.

The Collective Bargaining Agreements for both the office and the production bargaining units expired June 30, 1982. In early 1982, the Company informed the Union that because of severe economic problems, the St. Louis operation would be closed. Sales volume had decreased by sixty-five percent even though the number of employees remained the same. When the Union was informed of that fact, representatives asked what could be done to save some of the jobs. The parties thereupon entered into discussions and the discussions developed into negotiations. By April 1, 1982, an agreement was reached. The Union agreed that production would not continue in the St. Louis facility but that the Company would operate a distribution warehouse, a service department, and its offices from the St. Louis facilities. It was understood that the Company would reduce its warehouse service employees from thirty-five to ten or twelve people, approximately five of whom would perform warehouse duties and five or six of whom would perform as service representatives. With respect to the office, it was understood that the office complement would be reduced from ten to five employees. Although the plan for the reduction in staff of the production and warehouse employees was specific, there were no specific plans for the reduction in the office staff. When the Union inquired as to how the reduction in office staff would take place, the Company responded that its office operation would be streamlined, made more efficient, and the remaining employees would be expected to pitch in and work harder.

The Union agreed generally to the plan, excepting that it was also agreed that six weeks after the implementation of the plan, if problems developed, the Company and Union would meet in order to resolve such problems.

During the negotiations, the parties discussed many and varied matters including who would be laid off in the production and warehouse and service departments. Only one seniority list was maintained and it was decided that the most senior employees would be given an opportunity to do service work and would be given training by the Company. With respect to the office unit, the decision as to who would be laid off was to be by seniority only. Grievant was number six on the seniority list and therefore was the employee with the highest seniority who was laid off. Those employees who were to be laid off were given the election to receive severance pay instead of being laid off. Grievant, believing that the office could not function with only five employees, was the only employee who elected to take the layoff, giving due regard to the fact that she was next in line in seniority and would be the first to be called back. The others chose severance pay.

Even after the basic agreement was completed, discussions continued, and on or about May 18, 1982, the Union agreed that "in order to complete work in an efficient manner by the end of the day and/or adhere to customer service needs on an immediate basis, from time to time, supervisors will work hand in hand with bargaining unit employees", (in the office and clerical unit).

On or about June 25, 1982, the parties entered into an agreement providing that if an employee needs some time off to seek another job, the Company and Union would work together to see to it that the employee could have time off to seek other work. In addition, the Company agreed in writing to recognize the Union as a bargaining representative of its plant employees if the production facilities would ever be returned to the St. Louis facility. The agreement further provided as follows:

> "The parties agree that any and all present or future rights of Company employees found in the present Collective Bargaining Agrement and any future Collective Bargaining

Agreements are extinguished and of no further force and effect beyond the date the employee is permanently laid off or finds other employment as provided for above."

At some time during the discussions (during negotiations prior to April, 1982, according to a Company witness, and after negotiations but prior to June 30, 1982, according to a Union witness) the Company informed the Union of its plan to have telephone calls for repair made directly to the service department instead of going through the office clerical unit (the job that Grievant performed). The Union made known its objections, but when informed that the amount of time involved per day was less than one hour, the Union agreed that the new procedure would present no problems.

On June 30, 1982, the plan was implemented. The production of coffee was transferred to the facilities of the Company's parent corporation in Oklahoma City, Oklahoma. Approximately twenty-four employees in the production bargaining unit were laid off or terminated. Only five warehousemen were retained. Of the eight servicemen, two were laid off or terminated and six were retained. With respect to the office clerical unit, four elected to take severance pay and were terminated. Grievant was placed on layoff. Telephone service calls were thereafter routed directly into the service department. The payroll and most of the accounts payable functions previously performed by the office clerical unit were transferred to the office of the parent corporation in Oklahoma City. The payroll and payables were then put on the master computer at the Company's home office. On July 26, 1982, Grievant filed her grievance, complaining that the Company took away work from the bargaining unit while whe was on layoff. She demanded full back pay and recall.

On July 27, 1982, the Grievant's supervisor called her at home and asked her why she filed the grievance. Grievant explained why and wanted to know when the six-week meeting

would be held. Grievant was told that to the knowledge of her supervisor, there was no meeting scheduled. Thereafter, her supervisor told Grievant that he would be in Oklahoma City until the following Monday and requested that she "sit tight" until Monday and have the business representative call him on Monday. Also on July 27, 1982, the Company denied the grievance in writing.

On August 5, 1982 (Thursday), the Union requested that the Company waive the provisions of the two-man adjustment board and go directly to arbitration. On August 9, 1982, the Company refused to wavie the two-man adjustment board and informed the Union that, pursuant to Article 18, Section 3, its time to request the adjustment board had expired.

A two-man adjustment board meeting was held on August 25, 1982, but the board was deadlocked. Thereafter, the parties agreed to submit the issue of arbitrability and the substantive issues if the board found that the matter was arbitrable.

The effective date of the current Collective Bargaining Agreement was July 1, 1982.

PERTINENT CONTRACT PROVISIONS

Article 22

MANAGEMENT RIGHTS

The Company retains the exclusive right to manage its business and to direct its employees. The Company in the exercise of its right herein shall observe the provisions of this Contract.

Without in any way limiting the generality of the foregoing, the right to manage its business and to direct and control its employees includes but it not limited to:

1. The right to hire, supervise and train employees;
2. The right to suspend or discharge for cause its employees in accordance with the provisions of this Contract;

3. The right to establish, continue, discontinue, or modify Company business practices, rules or regulations;

4. The right to determine the existence, location and equipment of each company facility.

Article 27

WORK ASSIGNMENTS

The Employer agrees to respect the jurisdictional rules of the Union and shall not direct, require, or allow persons other than the employees in the bargaining unit here involved to perform work which is recognized as the work of the employees in said unit.

Article 28

SUBCONTRACTING

The Employer agrees that no function or service presently performed, or hereafter assigned, to the bargaining unit shall be subcontracted, leased, assigned or conveyed in whole or in part to any other person or organization, if any member of the bargaining unit is, at the time of such action, on layoff due to lack of work. The Employer agrees that the layoff proviso shall not be applicable until July 1, 1983.

The above language shall not be construed or interpreted to prohibit the Employer from adding or discontinuing manufacture, packaging, or processing of a product or performance of a service based on sound business considerations.

OPINION AND AWARD

I

ARBITRABILITY

The Company contends that the arbitrator is without jurisdiction or authority to hear this matter as two separate and independent time limitations contained in the grievance procedure were violated by the Union. The first separate time limitation appears in Section 1 of Article 18 and provides that, "The aggrieved employee or employees shall first take the matter up with the shop steward who in turn will take the grievance up with the foreman or forelady in charge of the department *within five days of thc occurrence."* (Emphasis added) The Company asserts that the "occurrence" complained of occurred on July 1, 1982, and neither the Union nor the Grievant claimed that they were unaware of the subcontracting which occurred thereon. As the grievance was not filed until July 26, 1982, the Company submits that the filing thereof was untimely.

The second separate time limitation appears under Section 3 of Article 18, wherein it is provided that, "If a grievance cannot be settled under Sections 1 and 2 of this Article, it shall be submitted to a two-man adjustment board within three (3) working days." The evidence established that although the Company denied the grievance in writing thereby completing steps one and two on July 27, 1982, the Company did not hear from the Union until a letter dated August 5, 1982 was received by the Company requesting the Company to waive the two-man adjustment board.

A grievance was filed on July 26, 1982, protesting that the Company took away work from the bargaining unit while on layoff. All parties are in accord that work was initially transferred out of the office on July 1, 1982. The Company contends that was the date of the "occurrence" which triggered the running of the five-day time limitation in Section 1 of Article 18.

The charge levied against the Company by the Grievant was violation of Article 27 and Article 28 of the Collective Bargaining Agreement pertaining to work assignments and subcontracting. The transfer of work out of the bargaining unit commenced on July 1, 1982 and continued on a daily basis thereafter. Although the initial occurrence was on July 1, 1982, there was a continuing transfer of work up to the time of the filing of the grievance. Thus, the occurrences were of a continuing nature. Section 1 of Article 18 requires the filing of a grievance within five days of the "occurrence". The language does not require the filing of a grievance within five days of the "initial" occurrence, and, therefore, when there is a charge of a violation which is of a continuing nature, it can well be argued that a greivance can be filed within five days of any of the occurrences. But even more persuasive is the fact that the parties agreed to meet and discuss any problems which might arise within six weeks after implementation of the reduction in working staff.

Arbitral authority is replete with rulings to the effect that a party to a collective bargaining agreement waives its right to rely on strict adherence to procedural niceties by discussing a grievance on the merits. In *Sperry Rand Corp.*, 60 L.A. 1189 (King, 1973), the arbitrator held timely a grievance that was orally discussed by the company and the grievants on the seventh day, in the face of a contract provision which read:

> "Any grievance...shall be officially presented...in writing within seven (7) working days, [sic] after it arises, or it shall not be considered by...the Employer."

In *Associated School Bus Service,* 72 L.A. 861 (Krebs, 1979), the arbitrator held that a discussion between the parties on the merits waived the requirement of a written grievance. Arbitrator Krebs stated the general policy as follows at page 862:

> "Other arbitrators have held that 'doubts as to the interpretation of contractual time limits or as to whether they have been met should be resolved against forfeiture of the

right to process the grievance.' Elkouri and Elkouri, "*How Arbitration Works*", (3rd Edition, 1973, page 149)."

A thorough revies of the *Associated School Bus Service* opinion demonstrates that the arbitrator felt that the actual notice of a grievance is the key element. Actual knowledge of the grievance also leads to the refusal to follow a written grievance requirement in *Walker Boudwin Construction Co.*, 55 L.A. 917, 922 (Kenaston, 1970).

It is sound industrial policy, and well-established in the arbitral area that discussion of the merits of a grievance waives the right of a party to rely on the technical procedural provisions of the contract. *Weirton Steel Co.*, 54 L.A. 1049 (Kates, 1970); *Interscience Encyclopedia, Inc.*, 55 L.A. 210 (Roberts, 1970).

Herein, there was a specific agreement to discuss within six weeks after implementation of the reduction in working force any problem which may arise. It is evidence that the parties intended to hold off discussing individual concerns for six weeks and then address all of the problems which may arise. It would thus appear that the parties agreed to waive the requirements of Article 18 with respect to the filing of grievances pending the anticipated meeting to be scheduled within the period of six weeks. On the basis of such agreement the arbitrator finds an express waiver of the time limitations set forth in Article 18.

As to the contention of the Company that the Union failed to submit the dispute to a two-man adjustment board within three working days, the finding that there was a waiver also applies. Furthermore, there was a conversation between the Grievant and her supervisor wherein Grievant was advised to sit tight until the following Monday (August 2, 1982). On August 5, 1982, the Union requested waiver of the two-man adjustment board. On August 9, 1982, the Company refused the request.

It is evident that not only were discussions taking place, but there was an express request made by the Company to "sit tight" or, in other words, to delay going forward with the particular grievance filed herein until August 2, 1982. On August 5, the request to waive the two-man board was made by the Union. It was not until August 9, 1982 that the Company responded. It was also not until August 25, 1982 that the two-man adjustment board met, certainly more than three days after the Company had refused the Union's request to waive the board. No evidence was adduced concerning the cause of the delay (from August 9 to August 25).

Under Section 3 of Article 18, there is no indication of *who* is responsible for the submission of a dispute to the two-man adjustment board. Instead, Section 3 of Article 18 simply provides that "it", meaning "the dispute", shall be submitted. Thus, it is the joint responsibility of both parties, i.e., the Union and the Company, to make a submission to the two-man adjustment board within the three-day designated period. The Company may not charge the Union with failure to make a timely submission unless it is shown that the failure to make such submission was the fault of the Union. No such showing was made herein. For the aforesaid reasons, the arbitrator finds that the matter is arbitrable and the arbitration board has jurisdiction.

II

SUBSTANTIVE ISSUES

The Union contends that the Company violated Article 28, headed, "Subcontracting", wherein it is provided that no function or service previously performed shall be subcontracted if any member of the bargaining unit is, at the time of such action, on layoff due to lack of work. Article 28 further provides that its language shall not be contrued to prohibit the Company from "adding or discontinuing manufacture, packaging, or processing of a product of performance of a service *based on sound business considerations.*" (Emphasis added)

The Union also refers to Article 27, headed, "Work Assignment", which provides that the Company "... shall not direct, require, or allow persons other than the employees in the bargaining unit here involved to perform bargaining unit work which is recognized as the work of the employees in said unit."

The Company contends that transferring the payroll and payable work to its parent headquarters and transferring the receipt of customer service calls from the office unit to the service unit is not violative of either the provisions of Article 28 or Article 27. The Company points out that Article 28 specifically allows the Company to discontinue "performance of a service based on sound business consideration." The Company further argues that Article 27 was meant to apply only to non-subcontracted work assignment disputes such as supervisors performing bargaining unit work.

It is uncontroverted that the rationale of the Company's transferring or subcontracting the payroll and payable work and the telephone answering formerly performed in the office unit was based upon a good faith belief that it would improve efficiency and save the Company money. It is clear the Company's action was based on sound business considerations. Thus the Company contends that the exclusionary language in Article 28 applies. Such language relied upon by the Company provides that the prohibition against subcontracting shall not be construed as to prohibit the Company from "adding or discontinuing manufacture, packaging, or processing of a product or performance of a service based on sound business considerations."

The exclusatory language of Article 28 upon which the Company relies does not refer to the type of work regularly performed by the office staff. The exclusatory language only refers to production work performed in the plant and warehouse and service work performed in the service department by members of another bargaining unit. The use of the term "performance of service" in the exclusionary language was clearly meant to apply

to the "service" department which regularly performs service functions for the customers of the Company. To enlarge the scope of such language to include office functions regularly performed not to service customers but to maintain records (payroll and payables) is reaching, unreasonable, and would be an absurd interpretation of the contract language.

It is clear that such language was meant to apply to the production, warehousing and service classifications represented by the same Union but in a different bargaining unit. In fact, the Union had specifically agreed to discontinue the production in St. Louis but had never agreed to discontinue the payroll and payable functions regularly performed by the office unit. Although the Union did agree to the elimination of telephone answering duties with respect to service calls, the Union did so in the belief that such work was negligible (one hour per day for one employee). Therefore, it is evident that the exclusionary language in Article 28 upon which the Company relies was never intended to apply to the office unit. The functions of the office were not mentioned therein, even though the functions of the production, warehousing and service units are mentioned specifically. Under will accepted standards for interpreting contract language, to expressly include one or more of a class must be taken as an exclusion of all others.

Thus, it appears that the parties agreed to the transfer of production and service work but not the transfer of office work. This conclusion is buttressed by a review of the history of the negotiations between the parties.

After the Union was advised that the Company planned to close its St. Louis operation, the Union announced its willingness to discuss changes in order to save as many jobs as possible. During the negotiations which followed, the parties discussed many and varied matters, including the closing of the St. Louis production facility whose work was to be performed elsewhere. Also discussed was the reduction of staff in the

warehouse and service areas and also in the office unit. When the Union inquired as to how the reduction of office staff would be accomplished, the Company responded that is office operation would be streamlined, made more efficient, and the remaining employees would be expected to pitch in and work harder. Based thereon, it was agreed that the office staff would be reduced from ten to five. No discussion of the transfer or subcontracting of work out of the office took place excepting only with respect to the transfer of the work of answering telephone calls into the service unit. When the Union inquired as to how much time was involved, a Company representative responded incorrectly (although unintentionally) that the transfer of such work involved only one hour a day, whereas, actually such work took approximately four hours a day. The Union had no objection to the transfer of one hour a day work, considering that such amount of work was negligible. By negative inference it can be concluded that the Union did have objection to the transfer of work which took a more substantial amount of time.

Although it was understood that the production work formerly performed in St. Louis would be transferred or subcontracted out, there was no understanding or agreement that any of the office work would be transferred or subcontracted out, excepting only the one hour of telephone answering duties.

The Company refers the arbitrator to the newly negotiated language in Article 22 - "Management Rights", which reserves to the Company its right to "establish, continue, discontinue or modify Company business practices, rules or regulations." The Company claims its right to transfer the payroll and payable and the receipt of customer service calls under such provision. Except to the extent as modified by the specific terms of its Collective Bargaining Agreement, the Company may exercise all legitimate and residual rights including the right to subcontract and transfer work. However, in the instant case, Articles 28 and 27 specifically restrict the Company in the exercise of its

right to subcontract or assign work out of the bargaining unit. Thus the general provisions of the management's rights clause do not bestrow [sic] upon the Company rights which it had negotiated away.

Under Article 28, the restriction upon the right of the Company to subcontract applies when a member of the bargaining unit is on layoff due to lack of work. However, the Company also therein agreed that the layoff provision does not become effective until July 1, 1983. Thus, it appears that the parties intended the prohibition against subcontracting to be absolute and not limited in any way until July 1, 1983, when the layoff provision takes effect. On the basis thereof and for the reasons as aforesaid, the arbitrator finds that the transfer, assigning and/or subcontracting of work out of the office bargaining unit was violative of Article 28.

Under the evidence adduced, and in accordance with the foregoing Opinion, and for the reasons stated therein, the grievance is sustained. The Company is hereby directed to cease and desist transferring, subcontracting or assigning work previously performed by members of the office bargaining unit out of the office bargaining unit. The Company is further ordered to make Grievant whole by compensating her with full back pay, less interim earnings and unemployment compensation she may have received, if any, from the date she filed her grievance (July 26, 1982) to the date the Company ceases and desists transferring, subcontracting or assigning work out of the bargaining unit or to the date of Grievant's recall, whichever occurs first; providing that unemployment benefits shall not be deducted from the back pay if Grievant is required to repay, and does repay, the amount of any such benefit to the proper governmental authority. It is further ordered that the arbitration board shall retain its jurisdiction for the sole purpose of resolving any dispute which may arise with respect to the monetary aspects of this award.

Dated this 14th day of January, 1983.

/s/ Richard. Ross
RICHARD L. ROSS, Arbitrator

The undersigned hereby concurs in/dissents from the foregoing Opinion and Award.

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Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
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No. 84-1369

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

MANHATTAN COFFEE COMPANY,
Petitioner,
v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 688,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONER

IRA MICHAEL SHEPARD *
PAUL MONROE HEYLMAN
NANCY LEE MORAN
SCHMELTZER, APTAKER & SHEPPARD, P.C.
Suite 500
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-1000
Counsel for Petitioner Manhattan Coffee Company

* Counsel of Record

April 26, 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR PETITIONER

Respondent, in its opposing brief herein, has mischaracterized the issue before the Court. First, Respondent argues that arbitrator's opinion and award is proper on the basis of several speculative assertions about the collective bargaining history of the parties. These assertions are not supported by the record and were rejected by both the majority and the dissent of the Eighth Circuit panel that heard the case. Respondent asserts that "It is reasonable to infer" certain conclusions from the

bargaining history and that "it was not unlikely that" the parties took certain actions in the negotiation of the contract. Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit at 7-8. Respondent provides no record citation that the arbitrator drew any such inferences, and provides no other record support for its assertions. Indeed, even the majority of the Eighth Circuit panel which affirmed the arbitrator's opinion and award firmly rejected the proposition that the "bargaining and negotiation history" supported the arbitrator's decision. *Manhattan Coffee Co. v. International Brotherhood of Teamsters, Local 688*, 743 F.2d 621, 624, 625 (8th Cir. 1984).

Second, Respondent has substantially mischaracterized the Sixth Circuit's decision in *International Brotherhood of Firemen and Oilers, Local 935-B v. The Nestle Company, Inc.*, 630 F.2d 474 (6th Cir. 1980). Having successfully argued the *Nestle* case before the Sixth Circuit, we take issue with Respondent's attempt to distinguish *Nestle* from the majority opinion of the Eighth Circuit in the instant case. In *Nestle*, the arbitrator's award was vacated because the arbitrator effectively excised the mandatory application of the insubordination clause from the collective bargaining agreement. Here, in parallel fashion, the arbitrator—without any justifiable reliance on bargaining history or any record support—excised the "sound business considerations" proviso from the parties' collective bargaining contract.

CONCLUSION

For the foregoing reasons and those stated in the petition herein, petitioner respectfully submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

IRA MICHAEL SHEPARD *
PAUL MONROE HEYLMAN
NANCY LEE MORAN
SCHMELTZER, APTAKER & SHEPPARD, P.C.
Suite 500
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-1000
Counsel for Petitioner
Manhattan Coffee Company

* Counsel of Record

April 26, 1985